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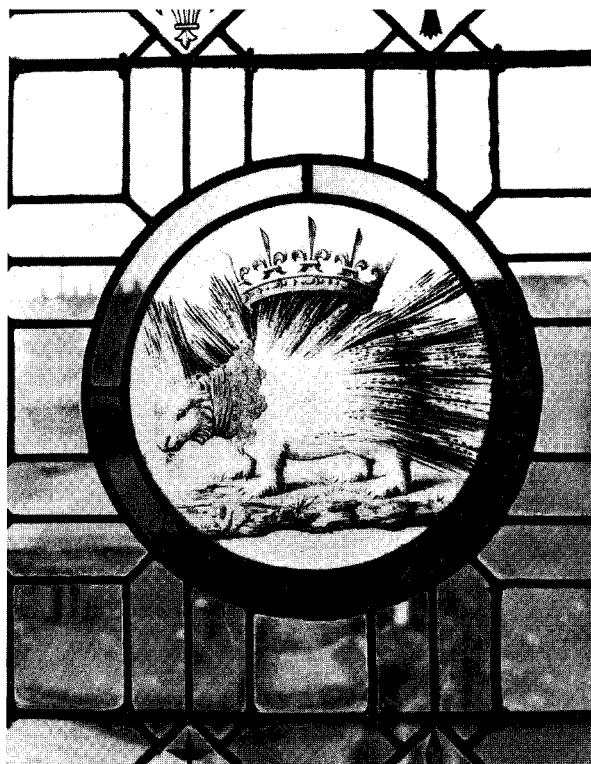
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the legislature.”¹⁹ It would seem that the November, 1980 elections, which tilted that legislature to the right, will provide a forum that will go much further than *Harris* in restricting abortions.

Justice Marshall makes an eloquent dissent in *Harris* — social arguments that would be more appropriate on the floor of the House. But Marshall can't vote on the floor of the House. Those who can are being increasingly pressured by their constituents to vote conservatively and traditionally — against inflationary liberalism. The Republicans in their platform asked for judges who hold values similar to their own; some groups frankly work as advocates for unborn children; others question whether many abortions for reasons of “mental health” are not simply abortions of convenience; and still others are motivated by a simple weariness with all give-away programs that foster dependency.²⁰

As early as 1974, Professor John T. Noonan, Professor of Law at the University of California, Berkeley, in his testimony before the Subcommittee on Constitutional Amendments of the U.S. Senate Judiciary Committee, advocated a constitutional amendment that would restore common law restrictions on abortion. The passage of such an amendment would reflect the realization that criticisms of *Roe v. Wade* are based on sound policy considerations. Until and unless such an amendment is passed, the letter of the law in *Roe v. Wade* is not dead; although the spirit that produced it seems to be.²¹



Homosexuals - Will Sexual Harassment Remedies Ever Be Available To Them?

Susan B. Stern

Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of, among other things, sex.¹ There is little legislative history regarding this particular classification. During floor debate, an opponent of the Civil Rights Act, in an effort to sabotage the bill, included sex in the list of proscribed categories.² Courts have indicated subsequently that the intent of Congress was to prevent disparate treatment of female employees and to equalize employment opportunities afforded each sex.³ It has been held that the word “sex” is commonly understood and, therefore, requires no judicial construction.⁴

¹ 42 U.S.C.S. §§ 2000 e et seq.

² See ANNOTATION, 12 A.L.R.Fed. 15, 22; *Barnes v. Costle*, 561 F.2d 983, 46 A.L.R.Fed. 198, 203 (1977).

³ 12 A.R.L.Fed. at 22. See also *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, cert. denied, 404 U.S. 950 (1971); ANNOTATION, 42 A.L.R.Fed. 189, 200.

⁴ *Rosen v. Public Service Electric & Gas Co.*, 328 F. Supp. 454 (1970).

¹ A. BLOCH, *MURPHY'S LAW BOOK II: MORE REASONS WHY THINGS GO WRONG* (1980).

² *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 JOHN MARSHALL JOUR. PRAC & PROC. 605 (1976).

³ *Hatsacothok no.* —, December 1979 (Abortions will still be allowed for unmarried minor children, aging women, cases of rape, and for psychiatric reasons).

⁴ 445 U.S. 924 (1980).

⁵ 410 U.S. 113 (1973).

⁶ *Id.* at 163.

⁷ J. Ely, *The Wages of Crying Wolf*, 82 YALE L. J. 920 (1973).

⁸ *Id.* at 928, n.58.

⁹ 410 U.S. at 153.

¹⁰ 82 YALE L. J. at 932, n.81.

¹¹ Pub. L. No. 96-123, §109, 93 Stat. 926.

¹² 445 U.S. 924 (1980).

¹³ *Id.* at 2685.

¹⁴ *Id.* at 2688.

¹⁵ 432 U.S. 464 (1977).

¹⁶ *Id.*

¹⁷ 445 U.S. 924, 943 (1980).

¹⁸ *Id.* at 2692.

¹⁹ *Maher v. Roe*, *supra* at 479.

²⁰ E.g., *Right to Life*, Americans United for LIFE Legal Defense Fund Human Life Foundation, Inc.

²¹ See J. NOONAN, *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES*. (1975).

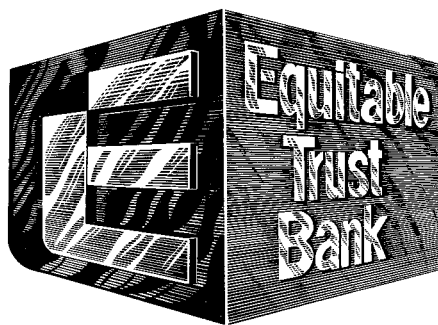
The courts have not accepted the argument that discrimination practiced against a homosexual is sex-based discrimination. This Title VII issue did not even reach the courts or the Equal Employment Opportunity Commission (EEOC) until 1973. Homosexuality is considered a mutable characteristic by the EEOC and therefore not afforded Title VII protection.

As recently as 1969, the United States Civil Service Commission maintained that "persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts . . . are not suitable for federal employment."⁵ In *Norton v. Macy*,⁶ this civil service regulation was found to be overly broad and to deny due process. The District of Columbia Circuit held that a competent civil servant could not be dismissed solely on the basis of private homosexual conduct. Dismissal may be justified where there is a rational connection between deliberately public homosexual involvement and diminished efficiency on the job.⁷

⁵ Lasson, Kenneth, *Homosexual Rights: The Law Influx and Conflict*, 9 U. BALT. L. REV. 47, 64, citing Federal Personnel Manual Supplement (Int.) 731-77.

⁶ 417 F.2d 1161 (1969).

⁷ Lasson, *supra*, at 64.



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There has been relatively little litigation by homosexuals in the private sector except to challenge discriminatory hiring or firing as violative of Title VII. The courts, as well as the EEOC, generally have held that Title VII refers to discrimination based on gender, not sexual preference.⁸ Title VII's prohibition against sex discrimination is not violated where some factor besides sex (as gender) underlies the alleged discriminatory act.⁹

There is a possible Title VII argument the courts have "ducked" in homosexual cases. If the class was composed of male homosexuals who received different treatment than their female counterparts, the discriminatory variable would be sex as gender and would be clearly prohibited by Title VII.¹⁰

Many commentators argue that homosexuality is not a mutable characteristic. Homosexual experiences start before or during adolescence.¹¹ Theories of the origin of sexual preference include the possibility that preference is a physical trait acquired at birth, or that sexual preference results from an endocrine imbalance in the male homosexual. Conclusively, sexual preference is beyond the individual's control from a very early age, although there is a difference of opinion as to whether it is congenital.¹²

The famous Kinsey Report estimated, in 1948, that four percent of the adult white male population in the United States is exclusively homosexual for life after the onset of adolescence; ten percent is more or less exclusively homosexual for at least three years between the ages of sixteen and fifty-five; thirty-seven percent experience homosexual orgasm between adolescence and old age; and fifty percent have some kind of homosexual contact by age fifty-four.¹³ Dr. Kinsey estimated that there were at least 2,250,000 confirmed homosexuals over eighteen in the United States.¹⁴ A 1969 government task force provided an increased estimate: "there are currently three or four million adults in the United States who are predominantly homosexual and many more individuals in whose lives homosexual tendencies or behavior play a significant role."¹⁵ A later study notes

⁸ *Id.*, at 67.

⁹ ANNOTATION, 26 A.L.R.Fed. 13, 29.

¹⁰ Siniscalco, Gary R., *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495, 503 (1975-76).

¹¹ Kovarsky, Irving, *Fair Employment For The Homosexual*, 1971 WASHINGTON U. L. Q. 527 (1971), citing I. Bieber, *Homosexuality: A Psychoanalytic Study* 8 (1962).

¹² Lasson, *supra* at 59.

¹³ A. KINSEY, W. POMERY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE*, at 650-51 (1948). See also Fisher, Robert G., *The Sex Offender Provisions of the New Maryland Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*, 30 MD. L. REV. 91, 94 (1970); and Kovarsky, *supra* at 529.

¹⁴ Kovarsky, *supra* at 529, citing Kinsey, note 14, at 648.

¹⁵ *Id.*, citing FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY 4

that four to five percent of all adult males are homosexual, and the percentage of female homosexuals is about half that of males.¹⁶ In view of these statistically significant percentages it is surprising that the EEOC has been unwilling to recognize discrimination against this group as unlawful.

The EEOC has frequently relied on decisions upholding employer regulations concerning grooming and appearance as not sex-based (gender based), as no immutable characteristic is involved.¹⁷ The EEOC in the past had held that other characteristics which can be described as mutable are protected by Title VII:¹⁸ sex discrimination has been found when employers have refused to hire males with beards and moustaches,¹⁹ and race discrimination has been found when blacks have been penalized for wearing "afros" as an expression of racial pride and heritage.²⁰ Nevertheless, neither the Commission nor the courts have been willing to extend these decisions to cover homosexuality. While it

¹⁶ Siniscalco, *supra* at 495, citing W. POMEROY, *HOMOSEXUALITY. THE SAME SEX. AN APPRAISAL OF HOMOSEXUALITY* (1969); D. WEST, *HOMOSEXUALITY* 39-42 (1967).

¹⁷ *Id.*, at 505.

¹⁸ *Id.*

¹⁹ *Id.*, at 506.

²⁰ EEOC Decision No. 72-1380, 2 CCH EMPL. PRAC. REP. :pg6364 (1971).

may be correct to assume that long hair is not a significant status or condition, it is simplistic to consider one's sexual proclivities or preferences to be as easily chosen or controllable as one's hairstyle. Given psychiatric, biological and social ignorance, it seems unreasonably arbitrary for the Commission to conclude that homosexuality is a "preference" sufficiently mutable as to fall outside the scope of Title VII. The characteristic of being homosexual would seem to fit within the category of socio-biological-environmental factors with which the courts have dealt in other contexts, such as race.²¹ It is arguable that sexual harassment of homosexuals should be treated differently, as it is a much more serious and traumatic form of discrimination. There have, as yet, been no cases brought by homosexuals seeking to invoke protection from sexual harassment.

An extremely important case in the area of sexual harassment is *Barnes v. Costle*,²² in which a black female alleged that her job was abolished because she repulsed her male superior's sexual advances. The district court had granted summary judgment for the employer on the ground that the substance of plaintiff's complaint, that she was discriminated against because of her refusal to engage in a sexual affair, did not, in the court's opinion, evidence an arbitrary barrier to continued employment based on her sex. The Court of Appeals disagreed, holding that the statutory embargo on sex discrimination is not confined to differentials founded wholly on an employee's gender. Rather, it is enough, the court noted, that gender is a factor contributing to the discrimination in a substantial way.²³

The court held that the discrimination was plainly based on plaintiff's gender, noting that the supervisor would not have made those sexual demands of a male employee.²⁴ The court noted in the footnotes that:

The vitiating sex factor thus stemmed not from the fact that what [Plaintiff's] supervisor demanded was sexual activity - which of itself is immaterial - but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fastened upon a male employee [T]here is no suggestion the [Plaintiff's] allegedly amorous supervisor is other than heterosexual.²⁵

The court went on to note that:

It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate

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²¹ EEOC Decision No. 71-2444, 2 CCH EMPL. PRAC. REP. :pg6240 (1971).

²² 561 F.2d 983, 46 A.L.R.Fed. 198 (1977).

²³ 46 A.L.R.Fed., at 208.

²⁴ *Id.*, at 207.

²⁵ *Id.*, note 49.

of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now - the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at bar, are to be distinguished from a bisexual superior who contains the employment opportunities of a subordinate of either gender upon the participation in a sexual affair. In the case of a bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.²⁶

On the other hand, in most states and in many counties homosexual activity remains condemned as a crime,²⁷ although there is a growing public and political disposition to regard the condition as something that should be treated - or tolerated.²⁸ For example, Illinois, Connecticut and Oregon have all recently changed their criminal codes to legalize homosexual acts between consenting adults.²⁹ In Maryland, a local ordinance was passed prohibiting discrimination based upon "sexual preference or personal appearance."³⁰ However, it should be noted that many legislators fear voter backlash should they support repeal of sodomy laws.³¹

In the United States, sodomy usually is punishable by a long prison sentence. Maryland, for example, provides for a maximum of ten years,³² while some states treat it as a misdemeanor.³³ These penalties, however, may be misleading. As one commentator notes,³⁴ in Maryland, homosexuals are occasionally prosecuted for the prostitution offense of solicitation,³⁵ which is apt to carry a fine of fifty to two hundred dollars, or a short jail sentence. In Washington, D.C., homosexuals often simply

²⁶ *Id.*, note 55, at 208. See also ANNOTATION, 16 A.L.R.Fed. 224, note 1, at 225.

²⁷ See, for example, MD. ANN. CODE art. 27 §§ 553-54 (Suppl. 1979). Maryland is one of 29 states that imposes criminal penalties for private homosexual conduct between consenting adults. A recommendation by the State Commission on Criminal Law to delete such penalties was rejected by the Maryland legislature in 1976.

²⁸ Lasson, *supra*, at 47, and note 1.

²⁹ Kovarsky, *supra* at 527, citing ILL. ANN. STAT. ch. 38, §§ 11-3, 11-4, 11-5, and 11-9 (Smith-Hurd, 1961). Pub. L. No. 838, § 214, repealing, GEN. STAT. OF CONN. ch. 944, § 53-216 (1969); 191 Ore. Laws ch. 743, §§ 112-16, repealing, ORE. REV. STAT., § 167.040 (1953).

³⁰ Lasson, *supra* note 7, at 48, citing Howard County, MD., Code § 12.200 (1978).

³¹ *Id.* Professor Lasson notes that the Community Relations Commission of Baltimore drafted an ordinance prohibiting discrimination against homosexuals, but were pessimistic over its chances for passage in an election year, citing UNPUBLISHED MINUTES OF COMMUNITY RELATIONS COMMISSION, June 20, 1979.

³² MD. ANN. CODE art. 27 § 553 (Cum. Supp. 1980).

³³ Fisher, *supra* at 92. The commentator notes, for example, that New York carries a maximum penalty of 3 months in jail or a \$500 fine.

³⁴ *Id.*, at 93.

³⁵ See MD. ANN. CODE art. 27 § 15(d), (e), (g) (1967).

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The United States, the Soviet Union and West Germany are the most notable of the countries in western civilization which severely punish private homosexuality between consenting adults. Such predominantly Roman Catholic countries as France, Italy, Mexico and Uruguay do not include such conduct in their penal codes, nor do predominantly Protestant Denmark and Sweden. The British Parliament eliminated the crime in 1967, as did Canada.³⁷

In most jurisdictions, one has the right to be a homosexual, but no right to *participate* in homosexual activity.³⁸ A person may not be punished for a status over which he or she has no control (a familiar example is alcoholism), but that same person may be prosecuted for an activity relating to such status (e.g. *public drunkenness*).

A few years ago the United States District Court for the Eastern District of Virginia in *Doe v. Commonwealth's Attorney*³⁹ handed down a somewhat distressing opinion. There the plaintiffs sought a declaratory judgment on the Virginia sodomy law as an unconstitutional violation of their right to privacy. The District

³⁶ Fisher, *supra*.

³⁷ *Id.*

³⁸ Lasson, *supra* at 49-50.

³⁹ 403 F. Supp. 1199 (1975), *aff'd mem.* 425 U.S. 901 (1976).

Court declared that the right to privacy extended only to married couples and not to homosexual relationships, and that the "promotion of morality and decency" was a sufficient basis for the prohibition of private sodomy.⁴⁰ This decision was affirmed without opinion by the Supreme Court.

Doe is hard to reconcile with *Eisenstadt v. Baird*,⁴¹ which extended the right of privacy to unmarried heterosexual couples. Therefore, the *Doe* court's first conclusion, that the right of privacy extends only to married couples appears to be clearly erroneous. And it is certainly arguable that the "promotion of morality and decency" would be just as adversely affected by extending the right of privacy to couples "living in sin". The Supreme Court's summary affirmance, therefore, comes as somewhat of a surprise, but carries little precedential weight.⁴²

Doe also serves to articulate another facet of homosexual rights litigation: homosexuals are not viewed as a "suspect class", against whom any discrimination must be subject to the "strict scrutiny" test, but instead are treated as a group to which the less severe "rational basis" standard is applied.⁴³ Many urge the middle-level

scrutiny afforded to cases involving discrimination based on sex.

As *Doe* was decided prior to *Barnes*, the courts will face an open question. In view of the wording of the sexual harassment guidelines handed down by the EEOC where no mention is made as to gender of either the harasser or the victim, the liberal intent of *Barnes* remains in sufficiently broad EEOC language.⁴⁴

On the other hand, the courts do not always feel constrained to follow the EEOC guidelines. In addition, the language used in *Barnes* was much broader than the case required, which would give a less liberal court an easy excuse for holding otherwise if faced with a harassment complaint by a homosexual.

The problem could be solved rather simply, if Congress would enact legislation prohibiting discrimination based on sexual preference. Such legislation has been proposed,⁴⁵ but is currently tied up in the House Judiciary Committee. It can be hoped that the courts or the legislatures will recognize that harassment, of anyone, for any reason, is offensive to human dignity and therefore should be actionable.

⁴⁰ *Id.*, at 1202.

⁴¹ 405 U.S. 438 (1972).

⁴² *Lasson, supra* at 56.

⁴³ *Id.*, at 57.

⁴⁴ Sec. 1604.11, BNA :pg 401:185.

⁴⁵ See H 2074, 96th Cong. 1st Session (1979); S 2081, 96th Cong., 1st Session (1979). Both proposed bills would prohibit employment discrimination on the basis of sexual orientation.

Solution: Page 34

Hidden Legal Lingo by Jim Oigan

Find and Circle the Word

Y	W	L	D	E	M	U	R	R	E	R	I	C
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